Filed 5/10/10 P. v. Whitmore CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WHITMORE, Defendant and Appellant.	B211212 (Los Angeles County Super. Ct. No. TA084622)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Whitmore appeals from the judgment entered upon his convictions by jury of resisting, delaying or obstructing a peace officer (Pen. Code, § 148, subd. (a), count 2),[1] as a lesser included offense of assault upon a peace officer (§ 245, subd. (c)), battery with injury on a peace officer (§ 243, subd. (c)(2), count 3), and leaving the scene of an accident (Veh. Code, § 20001, subd. (a), count 5).[2] The trial court sentenced appellant to a term of 16 months in state prison. Appellant contends that (1) there is insufficient evidence to support his conviction of battery with injury on a peace officer, (2) the trial court erred in failing to instruct the jury sua sponte on the offense of battery on a person other than a peace officer, as a lesser included offense of battery with injury on a peace officer, and (3) the trial court abused its discretion in refusing to reduce the battery with injury on a peace officer conviction to a misdemeanor.

We affirm.

FACTUAL BACKGROUND

The prosecution's evidence

We review the record in accordance with the usual rules on appeal. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On May 6, 2006, at 8:55 p.m., Lori Kee (Kee) was driving her car through the intersection of Sepulveda Boulevard and Main Street, in the City of Carson, with the green light. Her car was struck by a black sports coupe, which left the scene without stopping. Kee suffered minor injuries, but recovered.

Michael Bongiorno (Bongiorno) was driving through the same intersection at the time of the accident and saw a black car leave the scene. Bongiorno followed the car to a gas station, where appellant admitted to him being in the accident, said he was going back to the accident scene and said that "his car was about to fall asleep." Appellant left

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The jury acquitted appellant of attempted murder of a peace officer (§§ 664, 187, subd. (a)) in count 1 and attempted removal of a firearm from a peace officer (§ 148, subd. (d)) in count 4.

the gas station and went in a different direction than the accident scene. Bongiorno called 911 and gave the operator appellant's license number.

Los Angeles Deputy Sheriff Ethan Marquez was on duty at the time of the accident, in uniform, driving a marked black-and-white patrol car. He was accompanied by a civilian "ride-along," Christina Wood (Wood), who was only there to observe. Near 9:00 p.m., Deputy Marquez received a hit-and-run accident call.

Deputy Marquez went to the address of the registered owner of the black sports coupe and saw the car parked four or five feet from the curb. It had collision damage. He saw appellant walking in and out of the registered owner's house, while talking on a cell phone. The deputy illuminated appellant with his spotlight and asked him to approach. Appellant walked toward Deputy Marquez but kept putting his hands into his pockets. The deputy told appellant to keep his hands out of his pockets several times, which appellant briefly did, but again placed them in his pockets. Appellant began removing his jacket. Deputy Marquez told him to stop, so he could see appellant's hands.

As appellant came toward Deputy Marquez, the deputy met him on the neighbor's lawn. Appellant apologized for the accident and said that he wanted to wait for his mother to come home to talk with her before returning to the accident scene. Deputy Marquez asked him to come to the patrol car. Appellant appeared calm and continued saying he wanted to talk to his mother as he walked toward the patrol car. Once they got to the car, the deputy took appellant's cell phone, hung it up and placed it on the hood, along with appellant's glasses, which had fallen to the curb. He asked appellant to place his hands behind his back and interlock his fingers, which appellant did. Holding appellant's hands behind his back, Deputy Marquez helped appellant remove his jacket to make it easier to search him and patted him down for concealed weapons.

Still holding appellant's hands behind his back, Deputy Marquez asked appellant to step to the back of the patrol car and tried to get him into the backseat. Appellant became agitated, said he did not want to go into the car and begged to speak with his mother, stating that he would go to the accident site with her. With Deputy Marquez behind him, appellant became irate, screamed and pulled his hands away from the deputy,

placed them on the roof of the car and tried to push himself off and away from the patrol car and back into the deputy. Anticipating a fight, while appellant's back was still towards him, the deputy pulled out his baton and expanded it, intending to hit appellant because of appellant's actions. The deputy was "starting to wind back up but [he] couldn't take a swing because it would hit the car." Appellant then spun around and punched Deputy Marquez on the left side of the face, causing the deputy to drop the baton. Deputy Marquez punched appellant several times and pushed him into the backseat of the car.

Appellant pushed himself out of the car, lunged at the deputy, and grabbed the front of his uniform, forcing Deputy Marquez to the ground on his back. Deputy Marquez did not have his fists up nor was he making any threatening gestures when this happened. Appellant said he "was going to get [him]," got on top of him, grabbed him by the face and banged his head into the curb twice. As the deputy struggled to get appellant off of him, appellant grabbed the deputy's gun and tried to pull it from its holster. Deputy Marquez placed his hands over the gun and pushed down to keep it in the holster. Appellant let go of the gun, reached for the deputy's handcuffs, cuffed the deputy's left wrist and tried to cuff his right. Deputy Marquez moved his arms across his body to prevent being handcuffed and bit appellant. Wood jumped in the driver's seat of the patrol car and drove away.

Deputy Marquez managed to pull his gun out, flipped the safety switch, shoved the gun in appellant's stomach, and pulled the trigger twice, intending to shoot appellant in self-defense. The gun did not fire because it was prevented from doing so by a second safety mechanism. Appellant then grabbed the grip of the gun, Deputy Marquez holding the barrel with both hands, and a struggle over the gun ensued. Appellant was pulling it toward the deputy's chest and face, saying he was going to kill him. Deputy Marquez regained control of the gun and returned it to its holster. Appellant never had exclusive control over it.

Appellant placed his arms around the deputy's neck in a choke hold, causing Deputy Marquez to have trouble breathing. The deputy bit appellant's arm to no avail

and began screaming for help as loudly as he could. A patrol car approached, and Deputy Dean Docuyanan pulled appellant off of Deputy Marquez, who yelled, "Shoot him. Shoot him. He's got my gun."

Wood observed the assault. As Deputy Marquez was trying to put appellant in the patrol car, appellant asked for the deputy to call for help because his back was hurt. Deputy Marquez said that he would do so when appellant got into the car. She described that after Deputy Marquez tried to put appellant in the patrol car, appellant struck Deputy Marquez. Only then did the deputy strike appellant. Before appellant struck the deputy, the deputy was neither verbally abusive nor physically aggressive but continued to hold appellant's hands behind him to shepherd him into the patrol car. Deputy Marquez told Wood to "get out of here."

Deputy Blanca Arevalo responded to the scene and assisted in removing the handcuffs from Deputy Marquez's left wrist and helping to secure his vest and belt. She observed that the gun was holstered in its normal position, but the holster strap was cracked.

Deputy Marquez suffered gouges to his left hand, a sprained left wrist, and abrasions to his knees, legs, arms, hands and to the back of his head. Both of his knees were hyper-extended, and he had a concussion.

The defense's evidence

Dr. Jack Rothberg, a court-appointed psychiatrist, testified for the defense. He interviewed appellant in August 2006, without having reviewed any of the police reports or spoken with any witness or any of appellant's family or friends. Based on appellant's bizarre statements, his flat mood and lack of emotional response, Dr. Rothberg opined that appellant suffered from some psychosis, likely schizophrenia, which is prone to delusions, hallucinations and paranoia. It was highly likely he was experiencing some of those symptoms during the charged incident.

According to appellant's aunt, Janique Ratliff, in 2003, appellant was involved in a car accident in which he received head injuries. After the accident he was often nonresponsive, avoided people and exhibited bizarre behavior.

Rebuttal

On July 24, 2006, after reviewing arrest reports, Dr. Kaushal Sharma, a forensic psychiatrist, examined appellant, who was responsive and answered all questions. Dr. Sharma saw nothing bizarre or unusual in his answers and saw no indication that appellant suffered from mental illness at the time of the charged incident. In May 2008, Dr. Sharma again interviewed appellant and reached similar conclusions. Appellant's statement to Bongiorno that his "car was falling asleep," by itself, was insufficient to diagnose schizophrenia.

DISCUSSION

I. Insufficient evidence of battery on a peace officer

Appellant's defense at trial was that Deputy Marquez used excessive force in detaining him. The deputy was therefore not lawfully performing his duty, justifying appellant's reasonable use of force.

Appellant contends that his conviction of battery on a peace officer is unsupported by sufficient evidence that (1) Deputy Marquez was lawfully performing his duties when he raised his baton to hit appellant and tried to shoot him, and (2) appellant was not acting in self-defense when he first punched the deputy. He argues that "to the point where Marquez pulled out his baton, extended it, and drew it back in order to strike appellant, appellant had not been combative, threatening, or aggressive toward Marquez. Indeed, the evidence shows that Marquez not only overreacted, since appellant was unarmed and presented no present or immediate danger, but also had several potentially less brutal options than bashing appellant with his baton." This contention is without merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the

evidence. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Reversal is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* at p. 331.) The testimony of one witness, if believed, may be sufficient to prove any fact. (Evid. Code, § 411.)

To prove a charge of battery with injury to a peace officer, the prosecution must establish (1) the willful and unlawful use of force or violence, (2) on a peace officer, (3) "engaged in the performance of his or her duties," (§ 243, subd. (c)(2)), (4) the person committing the battery must know, or reasonably should know, that the victim of the battery is a peace officer, and (5) injury to the peace officer. (*People v. Lindsay* (1989) 209 Cal.App.3d 849, 857.) The sole issue raised on this appeal pertains to the third element of that offense; whether Deputy Marquez was performing his duties in detaining or arresting appellant or whether, because he used excessive force, his actions were unlawful and therefore not within the performance of his duties.

When a peace officer employs reasonable force to make a lawful arrest, the officer is acting in the performance of his or her duties, and the arrestee is obliged not to resist, and has no right to self-defense against such force. (*People v. Adams* (2009) 176 Cal.App.4th 946, 952; § 834a.) On the other hand, a peace officer is not engaged in the performance of his duties if the officer arrests a person using excessive force. (*People v. Delahoussaye* (1989) 213 Cal.App.3d 1, 7.) In such a case, the arrestee may use reasonable force to protect himself in accordance with the principles of self-defense (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47) and cannot be guilty of sections 245, subdivision (b), 243, or 148; and where the jury finds reasonable force was properly used by the defendant in self-defense, the defendant may not be convicted of any crime (*People v. White* (1980) 101 Cal.App.3d 161, 168; *People v. Soto* (1969) 276 Cal.App.2d 81, 85).

The evidence supports the jury's implicit finding that Deputy Marquez used reasonable force in detaining appellant and was therefore "perform[ing] his duties" in doing so. (§ 245, subd. (c).) When he asked appellant to approach him, appellant kept putting his hands in his pocket despite requests that he keep them out. Appellant then began removing his jacket, again concealing his hands, and giving the deputy reason for concern. When appellant came near Deputy Marquez, the deputy had appellant place his hands behind his back and removed appellant's jacket to conduct a patdown search.

After the search, Deputy Marquez attempted to direct appellant into the backseat of the patrol car, holding appellant's hands behind him. To this point, Deputy Marquez was neither threatening nor verbally abusive. Appellant began working himself into a frenzy, demanding to speak with his mother, claiming that he needed assistance for back pain, refusing to enter the patrol car, and becoming irate and screaming. He pulled his hands away from the deputy, placed them on the top of the car and pushed himself off and back towards the deputy. Appellant's erratic conduct and use of physical force to resist entering the patrol car, justified Deputy Marquez's concern for his safety and determination that he had to take physical action to ward off what he judged to be an oncoming physical attack.

Deputy Marquez, who was behind appellant, took out his baton and prepared to hit him. There was no evidence that appellant, with his back to the deputy, saw him do so. He nonetheless spun around and punched Deputy Marquez in the face. This confirmed that the deputy's fear of an imminent attack by appellant was reasonable and justified the deputy's attempt to use his baton. This conclusion is not undermined by the fact that Deputy Marquez attempted to hit appellant before appellant had hit him. A peace officer does not have to suffer the first blow before the officer can take appropriate action to protect himself or herself, where the totality of circumstances, including the suspect's behavior and circumstances warranting the detention or arrest, justify a reasonable belief that a physical attack by the suspect is imminent. (See *People v. Sons* (2008) 164 Cal.App.4th 90, 98, fn. 5 [an officer shooting first at a defendant in a gun battle does not establish excessive force as a matter of law, for a "police officer who is in the course of

making an arrest and who is looking down the barrel of a shotgun aimed at him or her need not wait for the first shotgun blast before discharging his or her service weapon"].)

Further, appellant's violent attack on the deputy could not have been to protect against an excessive use of force or in self-defense, for there was no evidence that appellant was even aware that the deputy was planning to use force. He was facing away from the deputy when the deputy readied his baton to strike appellant.

Deputy Marquez's attempt to shoot appellant was also reasonable and justified. Appellant was on top of him, had already smashed the deputy's head on the concrete, giving him a concussion, said he was going to "get him" and had tried to remove the deputy's gun from its holster. Deputy Marquez reasonably believed that his life was in danger and that deadly force was required.

Appellant argues that there were "less brutal options" available to Deputy Marquez than using his baton, including simply not taking any action until other officers arrived. When a peace officer acts reasonably and without excessive force when confronted with a dangerous situation, we will not Monday morning quarterback and assess whether he or she might have selected a better course of action.

II. Failure to instruct on lesser included offense

The jury was instructed in accordance with CALCRIM No. 945 on battery on a peace officer.[3] That instruction informed the jury that to find appellant guilty, it had to

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3 CALCRIM No. 945, as given to the jury states: "The defendant is charged [in Count 3] with battery against a peace officer [in violation of Penal Code section 243]. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. Ethan Marquez was a peace officer performing the duties of (a/an) Los Angeles Sheriff Deputy; [¶] 2. The defendant willfully [and unlawfully] touched Ethan Marquez in a harmful or offensive manner; [AND] [¶] 3. When the defendant acted, (he/she) knew, or reasonably should have known, that Ethan Marquez was a peace officer who was performing (his/her) duties(;/.) [¶] 4. Injury was inflicted on the peace officer. [AND [¶] 5. The defendant did not act (in self-defense). [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The slightest touching can be enough to commit a battery if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not

find that Deputy Marquez was lawfully performing his duties as a deputy sheriff, and that he was not lawfully performing those duties if he was arresting or detaining someone using unreasonable or excessive force. The jury was similarly instructed on resisting a peace officer as a lesser included offense in accordance with CALCRIM No. 2656 that the officer must be lawfully performing his duty and was not doing so if using unreasonable or excessive force.

Appellant contends that the trial court erred in failing to instruct on battery on a person other than a peace officer as a lesser included offense of battery on a peace officer. He argues that CALCRIM No. 945 was inadequate because it did not tell the jury that if the officer used unreasonable or excessive force and appellant responded in kind, appellant would be guilty of the lesser offense, misdemeanor battery against a person not a peace officer engaged in the lawful performance of his duties. We conclude that whether or not the trial court erred in failing to instruct on battery, appellant suffered no prejudice.

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's

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have to cause pain or injury of any kind. [¶] [The touching can be done indirectly by causing an object [or someone else] to touch the other person.] [¶] [A person who is employed as a deputy Los Angeles County Sheriff Deputy is a peace officer.] [¶] [The duties of a Los Angeles County Sheriff deputy include conducting an investigation and/or questioning individuals regarding a hit and run accident. [¶] [A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive).] [¶] 'Injury' means any physical injury which requires professional medical treatment. It is the nature, extent, and seriousness of the purported injury that is determinative—not whether the allegedly injured party sought medical treatment."

understanding of the case.'"'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*), quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) This obligation has been held to include giving instructions sua sponte on lesser included offenses when the evidence raises a question whether all of the elements of the charged offense are present. (*Breverman, supra,* at p. 154.) A trial court must instruct sua sponte on a lesser included offense supported by the evidence even if it is inconsistent with the defendant's theory of the case. (*Id*. at p. 159.)

A lesser offense is necessarily included in the charged offense only if it meets either the "'elements test'" or the "'accusatory pleading test.'" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.) The "elements test" is satisfied when all of the legal ingredients of the corpus delicti of the lesser offense are included in the elements of the greater offense. (*Ibid*.) The "accusatory pleading test" is satisfied "'"if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed."'" (*Id.* at pp. 288–289.) A greater offense cannot be committed without committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) "When, as here, the accusatory pleading describes a crime in the statutory language, an offense is necessarily included in the greater offense when the greater offense cannot be committed without necessarily committing the lesser offense." (*People v. Marshall* (1997) 15 Cal.4th 1, 38.) Because battery on a peace officer cannot be committed without committing a battery, the latter offense is a lesser included offense of the former.

We need not decide whether the trial court erred in failing to instruct the jury on battery as a lesser included offense of battery on a peace officer, for even if it did, the error was harmless in that it is not reasonably probable that had the jury been so instructed a result more favorable to appellant would have resulted. (*Breverman, supra,* 19 Cal.4th at p. 165 [the failure to instruct on a lesser included offense in a noncapital case is evaluated under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].) If a peace officer uses only reasonable force in effectuating an arrest or detention, the suspect has no right to use force to resist or to resort to self-defense. (*People v.*

Adams, supra, 176 Cal.App.4th at p. 952.) The evidence here was strong that Deputy Marquez used only reasonable force in detaining appellant. Both he and Wood testified that before appellant punched the deputy, the deputy had not been verbally abusive or physically aggressive with him. It was only after appellant's behavior became erratic, he physically resisted entering the patrol car and Deputy Marquez feared a physical attack, that the deputy readied his baton to strike him. When Deputy Marquez lifted his baton, the evidence is that appellant's back was to him and that he spun around and punched the deputy in the face. There was no evidence he was defending himself against being struck.

Additionally, the jury was instructed in connection with the charge of resisting a peace officer (the lesser included offense of count 2) that the prosecution was required to prove that the peace officer was lawfully performing the officer's duties as a peace officer and that the officer was not doing so if the officer used excessive or unreasonable force. Having found appellant guilty of that offense, the jury necessarily found that Deputy Marquez was lawfully performing his duties in detaining appellant and was not using excessive force, the same finding necessary to convict appellant of battery on a peace officer. Having so found, the jury would not under the instructions given have found appellant guilty of battery on a person other than a peace officer.

III. Failure to reduce count 3 to a misdemeanor

Appellant was convicted of felonious battery on a peace officer and leaving the scene of an accident and misdemeanor resisting a peace officer. He made a motion to reduce the two felony convictions to misdemeanors. He argued that he had no criminal record, he had psychiatric problems and had previously been declared incompetent to stand trial, the victim had suffered no serious injuries, there were no weapons used, the incident was merely a fistfight, and he had been a college student in Tennessee and a felony conviction would impede his obtaining government financial assistance to complete his education and to reenter society.

The trial court reduced the leaving the scene of an accident conviction to a misdemeanor but denied the motion as to the battery on a peace officer conviction, after

extended argument. With regard to the battery conviction, the trial court agreed with the prosecution that Deputy Marquez received severe injuries, including a concussion and that a weapon was involved in the fight when appellant tried to grab the firearm and aimed it at the deputy's head. The prosecutor also pointed to several prior contacts that appellant had had with the law.

The trial court sentenced appellant to the low term of 16 months on his felony conviction and to time served on the two misdemeanors. It struck a section 12022.1 enhancement applicable because appellant was out of custody on bail at the time of the charged offenses.

Appellant contends that the trial court abused its discretion in denying his motion to reduce the conviction of battery on a peace officer to a misdemeanor, resulting in a miscarriage of justice. He argues that the trial court's decision was irrational because appellant was young, had already been incarcerated for a term longer than the felony sentence imposed for that crime, had an "insignificant criminal record," had been a college student suffering mental impairment, and that imposing a felony sentence for a wobbler for which appellant had already served the time was not directed to the ends of justice.

We review a lower court determination that a "wobbler" is a felony instead of a misdemeanor for an abuse of discretion. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981 (*Alvarez*).) "[S]ection 17 'vest[s] in the trial court discretion to sentence defendants convicted of [wobblers] to state prison or to jail, without mention of standards for exercise of that discretion.' Nonetheless, the choice between felony and misdemeanor under section 17, subdivision (b)(1), 'is dependent on a determination by the official who, at the particular time, possesses knowledge of the special facts of the individual case and may, therefore, intelligently exercise the legislatively granted discretion.'" (*People v. Dent* (1995) 38 Cal.App.4th 1726, 1730.) While this discretion is exceedingly broad, "'[t]he courts have never ascribed to judicial discretion a potential without restraint.' . . . '[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter

at issue.'" (*Alvarez, supra,* at p. 977.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational and arbitrary. (*Ibid.*) In the absence of such showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives. (*Ibid.*)

Among the factors to be considered in exercising this discretion are "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*Alvarez, supra,* 14 Cal.4th at p. 978.) Individualized considerations of the offense, the offender and the public interest must be considered. (*Ibid.*) The decision to reduce a wobbler to a misdemeanor "should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history." (*Alvarez, supra,* at p. 979.)

We cannot substitute our judgment for that of the trial court. (*Alvarez, supra,* 14 Cal.4th at p. 978.) The trial court made a "thoughtful and conscientious assessment of all relevant factors" (*id.* at p. 979) and did not abuse its discretion by denominating appellant's conviction of count 3 to be a felony. Contrary to appellant's characterization of the incident as merely a fistfight, Deputy Marquez's description was quite different. He testified that he was fighting for his life, appellant gave him a concussion by twice slamming his head against the concrete pavement, appellant threatened to kill him and tried to get the deputy's gun, and began choking the deputy to the point where the deputy could not breathe.

There is nothing in the record to suggest that the trial court did not consider all of the relevant considerations. In the face of a record which does not affirmatively indicate that the trial court failed to consider all of the appropriate factors, we presume that it considered all relevant criteria (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430). We cannot say its conclusion was arbitrary or capricious.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ